No. 89-1281

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

HERNAN BOTERO MORENO,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

OF COUNSEL:

W. Emory Daugherty
Royal Palm Towers
1650 S. Dixie Highway
Boca Raton, FL 33432
(407) 391-0002

Edward F. Canfield
COUNSEL OF RECORD
Casey, Scott, Canfield &
Heggestad, P.C.
805 15th Street, N.W., #600
Washington, D.C. 20005
(202) 682-4082
For Petitioner
Hernan Botero Moreno

TABLE OF CONTENTS

Page

SUMMARY.....1

I. PETITIONER USED THE CORRECT STANDARD OF REVIEW.....2

II. THE ELEVENTH CIRCUIT DECISION CONTRADICTS THIS COURT AND OTHER CIRCUITS.....2

III. THE "MONEY LAUNDERING" COMMENTS IN THE OPPOSITION ARE UNFAIR AND MISLEADING.....3

IV. PETITIONER WAS NOT INDICTED OR CONVICTED FOR INCOME TAX FRAUD.....4

V. THE STATUTES CITED ARE IRRELEVANT TO THE ISSUE RAISED BY THIS PETITION.....6

CONCLUSION.....7

TABLE OF AUTHORITIES CITED

CASES

Page

Carpenter v. United States,
484 U.S. 19 (1987).....3,5

Davis v. United States,
417 U.S. 333 (1974).....2

Helvering v. Horst,
311 U.S. 112 (1940).....5

McNally v. United States,
483 U.S. 350 (1987).....3,7

United States v. Gimbel,
830 F.2d 621 (7th Cir. 1987).....3,5,6

United States v. Herron,
825 F.2d 50 (5th Cir. 1987).....3,5,6

STATUTES

Money Laundering Control Act of 1986,
Pub. L. No. 99-570,
100 Stat. 3207-18.....6

Anti-Drug Abuse Act of 1988,
Pub. L. No. 100-690,
§ 7603, 102 Stat. 4508.....7

31 U.S.C. 5324 (Supp. V. 1987).....7

No. 89-1281

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

HERNAN BOTERO MORENO,

Petitioner,

v.

THE UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

SUMMARY

The decision of the Eleventh Circuit in this case is based on a legal theory which will have a serious impact wherever U.S. Government forms and questionnaires are involved. The lower court stated in this case that items of information on Government forms constitute property belonging to the United States Government, supplying the necessary U.S. Government property interest to sustain conviction under the mail fraud statute. The Government in its Opposition impermissibly broadened that vague theory of Government property to any potential property interest of the Government such as recovery of taxes accruing from broad regulatory objectives recited in states and regulations. There are scores of statutes and regulations which require forms and questionnaires. Adoption of a new legal theory that the United States has a cognizable property interest in bare data, such as names and addresses on forms, is an unwise expansion of the law with respect to Government property.

Rather than confronting Petitioner's legal issue the Government's Opposition selects partial facts from the record to convince the Court that this case is routine and involves drugs. The Government's argument assumes that legitimate currency exchange businesses are automatically engaged in "money laundering." Petitioner was convicted of mail fraud on the baseless assumption that a currency exchange business must necessarily involve "money laundering." The economic realities in Latin America which

encourage local governments to sanction private conversion of hard currency to local soft currency have been deftly ignored. The prime significance of this case is that a new class of U.S. Government property interests was created by the Court in billions of items of data on Government forms to justify conviction under the mail fraud statute.

I. PETITIONER USED THE CORRECT STANDARD OF REVIEW.

The maverick theory of the Eleventh Circuit concerning the Government's property interest in data on Currency Transaction Reports ("CTRs") is different from every other circuit which has considered the issue. Petitioner was imprisoned for 30 years for mail fraud on the basis of that incorrect reasoning. This contradiction among circuits points to a "miscarriage of justice." The record also shows the use of a false affidavit by the Chief Assistant U.S. Attorney to create the impression without objective evidence that this case involved drugs. Imprisonment for 30 years at the Petitioner's advanced age and physical condition is under the circumstances sufficient to support a collateral attack on the conviction. This case meets the standard referred to in *Davis v. United States,* 417 U.S. 333 (1974).

II. THE ELEVENTH CIRCUIT DECISION CONTRADICTS THIS COURT AND OTHER CIRCUITS.

The Opposition confuses the legal issue by dwelling upon the cases which distinguish tangible and intangible property rights. Petitioner does not rely on that

distinction. The alleged deprivation of the items of data on CTRs cannot possibly qualify as an intangible Government property right of the rank sufficient to justify conviction under the mail fraud statute. Petitioner asserts that the information on CTRs is not property of the United States Government nor an intangible property right sufficient to justify the elements of the mail fraud statute.[1]

III. THE "MONEY LAUNDERING" COMMENTS IN THE OPPOSITION ARE UNFAIR AND MISLEADING.

Contrary to the innuendoes in the Opposition, Petitioner was convicted and imprisoned for mail fraud not for "money laundering." There is no credible evidence that

---

1/ The Petitioner's position is not inconsistent with *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987). In *McNally* the Court held that a scheme to defraud a state's citizens of their intangible rights to honest and impartial government service did not constitute a mail fraud under the statute. *McNally*, 483 U.S. at 360. The Court pointed to legislative history requiring the deprivation of property as classically defined and recognized. In *Carpenter*, the court found that a reporter violated the mail and wire fraud statute when he appropriated his newspaper's confidential information for personal gain. However, the intangible property right protected under *Carpenter* was the long established property right which a newspaper holds in the confidential information which it produces in the regular course of business. No such property right has ever been granted to the Government, by Congress or the Courts, on the data provided by citizens on Government forms. Courts construing *Carpenter* and *McNally* have specifically refrained from inventing new Government property rights to trigger protection under the mail fraud statute. *See e.g., United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) and *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) (failure to file CTRs does not violate a Government property right under the mail fraud statute).

he was engaged in "money laundering." This case is another of those sad instances in which the Government relies solely on the purchased testimony of individuals who are themselves self-confessed felons in order to obtain hearsay about a third individual. The Government has consistently refused to analyze currency exchange businesses which are legitimate government licensed operations throughout Latin America. Petitioner was an agent of a currency exchange business which exchanged U.S. Dollars retained in the United States for pesos in Colombia. There is no "money laundering" scheme on record which involves the illogical process of transferring hard currency into inflationary soft currency, the latter useless in the future to its holders without reconversion into hard currency. The conspiracy theory in this case was strained to the outer limits.

IV. PETITIONER WAS NOT INDICTED OR CONVICTED FOR INCOME TAX FRAUD.

In order to avoid the consequences of the lower court's incorrect conclusion that data on Government forms is Government property, a new theory never advanced at trial was set forth in the Opposition. That theory was that Petitioner was indicted and convicted for income tax fraud. The record shows that Petitioner was an agent of the currency exchange business and, consequently, can be indicted and convicted of tax fraud only if he received some economic benefit from the money which was deposited by the currency exchange business. *Helvering v. Horst*, 311 U.S. 112 (1940). There was no allegation in the indictment nor proof at trial that Petitioner received any of the money in the currency exchange. The new theory that the indictment was

for the purpose for protecting the U.S. Government from tax fraud is a late and erroneous argument. The indictment in fact alleged that Petitioner transferred the money to others which directly contradicts the possibility of personal income tax evasion. Neither the property theory of the Court nor the lately advanced theory of the Opposition on income tax fraud can sustain the mail fraud conviction.

Both *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) and *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) support Petitioner. The decision in *Carpenter*, *supra*, does not invalidate the conclusion of *Herron* and *Gimbel* that failure to file CTRs is not a crime under the mail fraud statute. *Carpenter* dealt with the long recognized property right which a newspaper holds in the proprietary information it creates. *Carpenter,* 484 U.S. 19. *Herron* and *Gimbel* did not involve such a clearly recognized property right.[2] Only if the CTR information has intrinsic economic value as claimed by the Government in this case can *Herron* and *Gimbel* be inapposite. The quotation on page 6 of the Opposition from *Herron* is misleading. While the *Herron* Court acknowledged that the purpose of CTR filings was to leave a "paper trail"

2/ In *Gimbel* the Seventh Circuit held that defendants who deprived the Treasury Department of CTRs and other data useful in an assessment of income taxes, had not deprived the Government of money or of any recognized property interest, and had therefore not violated the federal mail fraud statute. *Gimbel*, 830 F.2d at 626. Similarly, the Fifth Circuit in *Herron* found that defendants who failed to file CTRs when depositing currency in domestic banks had not violated the mail fraud statute because "the Government had no right of ownership in CTR information." *Herron*, 825 F.2d at 56. The *Herron* court properly "refuse[d] to create a new strand in the bundle of property rights which gives the Government an ownership interest in information it does not already possess." *Herron*, 825 F.2d at 57-58.

for future tax determinations by the IRS, the Court held that the property requirement of the mail fraud statute is not satisfied unless a deliberate scheme to deprive the United States Government of taxes is alleged and proven. *Herron*, 825 F.2d at 56. Absent such an allegation in the *Herron* indictment, the Fifth Circuit refused to find a Government property interest in the CTR information sufficient to trigger a mail fraud violation. *Id.* at 57-58. The Botero indictment, similarly, failed to allege any tax evasion scheme, and should properly have resulted in a similar outcome.

V. THE STATUTES CITED ARE IRRELEVANT TO THE ISSUE RAISED BY THIS PETITION.

Petitioner was not convicted under a "money laundering" statute but for mail fraud. The passage of the statute cited (Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-18) by Congress does not nullify the legal issue presented by this case, i.e., whether the data on CTRs and other Government forms is property of the United States Government sufficient to satisfy the mail fraud statute.

The second statute cited in the Opposition, (The Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508), which overturned the decision in *McNally, supra*, resurrected the idea that depriving citizens of their right to the honest operation of their Government constitutes mail fraud. But the Government has denied throughout this case that the "fiduciary" theory was part of the case against Petitioner. The United States has insisted

throughout that it prosecuted Petitioner on the basis of the deprivation of property in the form of data not the "fiduciary" theory incorporated in the reporting requirement provisions of 31 U.S.C. 5324 (Supp. V. 1987). Consequently, the statute relied upon by the Opposition does not render moot the issue of whether data on Government forms belongs to the United States.

CONCLUSION

The Petition for a Writ of Certiorari should be granted in order to prevent the widespread use by the Government of a legal theory which can only have pernicious effects upon enforcement of the many statutes and regulations requiring the submission of data on Government forms.

Respectfully submitted,

Edward F. Canfield
COUNSEL OF RECORD
Casey, Scott, Canfield &
Heggestad, P.C.
805 15th Street, N.W., #600
Washington, D.C. 20005
(202) 682-4082
For Petitioner
Hernan Botero Moreno

OF COUNSEL:
W. Emory Daugherty
1650 S. Dixie Highway
Boca Raton, FL 33432
(407) 391-0002

Dated: April 24, 1990